SUBJECT INDEX

PAGE

Statement 1

Argument 7

I.

The Nevada State judgment, being subject to attack for collusion, is not res judicata until the issue is tried in the court where it is legally and in good faith raised..... 7

II.

No stockholder (except the Castlemans and Feuerman personally) or attorney (except their New York attorneys) is estopped from challenging the Nevada State judgment for collusion 9

III.

The Nevada judgment did not meet the requirements of due process 10

IV.

Neither the Delaware action nor the sale to respondent Hughes of all assets rendered the action herein moot..... 11

Conclusion 12

Appendix. Excerpts from Record 371-3.....App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Civil Aeronautics Board v. American Air Transport, 344 U. S. 4	13
Cohen v. Young, 127 F. 2d 721	7
Cuthill v. Ortman-Miller Mach. Co., 216 F. 2d 336	7, 8, 10
Ewing v. Gardiner, 341 U. S. 321	13
Masterson v. Pergament, 203 F. 2d 315	7
Pellegrino v. Nesbit, 203 F. 2d 463	3, 8, 13
Pergament v. Frazer, 93 Fed. Supp. 13	8
Romero v. Weakley, 226 F. 2d 399	3, 13
Schiff v. RKO Pictures Corporation, 104 A. 2d 267	1
Schwab v. Coleman, 145 F. 2d 672	5
Securities and Exchange Commission v. Otis & Co., 338 U. S. 843	13
Stella v. Kaiser, 213 F. 2d 64	8
United States ex rel. Robinson v. Johnston, 316 U. S. 649	13
Western Pacific Railroad case, 345 U. S. 247	13
Western Union v. U. S. & M. T. Co., 221 Fed. 445	3
Winkelman v. General Motors Corporation, 48 Fed. Supp. 490	7

Rule	
Local Rule 1(d)	4

Holy Bible	
Deuteronomy 1:6	13

In the Supreme Court of the United States

October Term, 1955

No. 632

ELI B. CASTLEMAN, MARION V. CASTLEMAN, LOUIS FEUERMAN, JULIUS NOVEMBER, ELEANOR NOVEMBER, and BERNARD REICH,

Petitioners,

vs.

HOWARD R. HUGHES, RKO RADIO PICTURES, INC., ELI B. CASTLEMAN, MARION V. CASTLEMAN and LOUIS FEUERMAN,

Respondents.

Petitioners' Reply on Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Statement.

The *Per Curiam* Opinion of the Court of Appeals filed November 3, 1955, is now reported in 227 F. 2d 533.

Schiff v. RKO Pictures Corporation, 104 A. 2d 267, cited in said Opinion, is not officially reported.

We submit that a fair summary of the briefs in opposition stripped of personal abuse is: that the Nevada judgment is *res judicata;* that no collusion has been shown; that the interveners have no standing; that the attorney of record Reich is without a party to represent and otherwise has no standing; and that the sale to Hughes (with which the Delaware court refused to interfere) rendered the action below moot.

On the other hand, we submit: that the Nevada judgment is challengeable for collusion; that the issue of collusion has never been tried in any adversary proceeding; that the interveners have not been deprived of standing by inaction on the part of the trial court; that the attorney of record in a class action has both the duty and right to proceed in favor of the entire class and especially for interveners; and that the sale to Hughes did not render the action moot.

In particular we would reply to Respondents as follows:

1. Their anger directed at Reich, we submit, stems from his refusal to renounce his responsibility to the trial court as California attorney of record, his causing to be set aside the first dismissal made and entered by them without his knowledge or consent, and his persistent challenge to the validity of the Nevada judgment obtained by them in a non-adversary proceeding.

As to their attack on Reich's alleged fee motivation based on matters *dehors* the Record, we have reproduced in an appendix hereto a record colloquy between the District Court and counsel relative to that issue [R. 371-373]. Also, we would respectfully draw the Court's attention to the fact that the issue of fees is not raised by the Petition. Our aim was to present only those issues which were of major concern to the integrity of the Federal judicial process.

2. No brief for the respondent Hughes has been filed, on the theory suggested by respondent RKO that service of process on Hughes having been quashed below, he is not before the Court. This theory loses sight of the principle that an appeal from a final judgment brings up

for review intermediate orders. (*Western Union v. U. S. & M. T. Co.*, 221 Fed. 445, 551 (C. C. A. 8, 1915).)

3. Respondents have restated the facts based on *their* affidavits, ignoring that part of the record which supports petitioners, and ignoring the fundamental fact that there was no trial and no findings in the trial court on the fact issues—only a refusal on the part of the court to hear and determine.

4. Respondents sought below and now seek affirmance predicated on the *discretion* of the trial court, losing sight of the principle that where the trial court refuses a trial, abdicates its jurisdiction, and fails to *exercise its discretion*, the judgment may not stand. (Please see Pet. p. 9, *et seq.*; also case decided by different panel of same court below, *Romero v. Weakley*, 226 F. 2d 399, 401 (1955).)

This refusal to hear and determine on the part of the trial court, it is respectfully submitted, of itself answers respondents' allegations that the Novembers appeared at the Nevada hearing on the motion to dismiss for mootness (actually, they did not [R. 258, 259], but the issue was never tried); that their petition to intervene was untimely (actually, it was made months before the motion to dismiss, although it could have been made after judgment, *Pellegrino v. Nesbit*, 203 F. 2d 463, 465 (9 Cir.), but the issue was never tried); that Reich was discharged (actually, there was only a purported discharge, the motion to discharge him was never ruled on [R. 119, 121]); that Reich's charges of collusion were not proved (actually, there was no ruling on the issue of collusion in the trial court although a trial was expressly requested [R. 243, 248, 249]); and that proper notice of the eventual character of the Nevada hearing was given stockholders (actually, there was no ruling on this issue although expressly raised [R. 243, 244, 255, 256]).

5. Respondents' reference to a stipulation made by Reich but fraudulently induced by respondents [R. 165-166], staying the proceedings pending outcome of a security motion is without substantive meaning in view of the fact that the stipulation was abandoned and failed when the action was dismissed the first time without the knowledge or consent of plaintiffs' attorney of record, and in any event in the face of the fraud and collusion charges. Certainly no stay can prevent proceedings designed to expose fraud and collusion.

6. At the time the action was dismissed the first time without Reich's knowledge or consent, plaintiffs' New York attorneys were on the Complaint by courtesy only. They did not comply with Local Rule 1(d)* [R. 44]. Nor did they ever comply; all that transpired was that a third attorney, not himself attorney of record for plaintiffs, after the charges of collusion were made, moved the admission of the New York attorneys for the purpose of the action only [R. 120, 182].

---

*Local Rule 1(d) Non-Resident Attorneys:

"Only a member of the bar of this court may enter appearances for a party, sign stipulations or receive payment or enter satisfaction of judgment, decree or order. However any member in good standing of the Bar of any United States court, or of the highest court of any State or of any Territory or Insular possession of the United States, who has been retained to appear in this court, and who is not a resident of this district, or does not maintain an office in this district for the practice of law, may be permitted after application, without previous notice, to appear, and participate in a particular case. Such applicant shall designate, in his application so to appear, a member of the bar of this court who maintains an office in this district for the practice of law, with whom the court and opposing counsel may readily communicate regarding the conduct of the case. He shall also file with such application the address, telephone number and written consent of such designee. Such permission to appear being a limited one, no certificate of admission shall be issued by the Clerk."

7. Plaintiffs-Respondents, by taking words out of context, by confusing the time element, and by misunderstanding courtesy to the trial court, attempt to blame the trial court's inaction on Reich, but the full text belies their attempt [R. 44-55, 90-91, 135-172]. The real point is that when the motions were pressed, they were not determined [R. 351-352, 355].

8. Reich's standing in this case was challenged in the Courts below. The District Court refused to rule; the Court of Appeals denied a motion to dismiss the appeal and a motion to "re-settle" its order of denial. Moreover, Reich's right to proceed was not denied, but was assumed in that Court's decision (App. A to Pet.).

9. Mr. Justice Cardozo's statement in *Landis v. North American Company,* quoted by Plaintiffs-Respondents, that the trial court has power to stay, does not support the trial court's refusal to hear and determine—because had the trial court acted to stay, that act could have been reviewed. In *Schwab v. Coleman,* 145 F. 2d 672, 677, 678 (C. C. A. 4, 1944), the court stated:

> "If the judge had passed upon the petitions of applicants and denied them naturalization, they could have appealed to us and asked a reversal of his decision, which could then have been reviewed by us in the light of the law and the evidence. * * * A continuance may, of course, be granted in naturalization cases as well as in others, and whether or not such continuance shall be granted is ordinarily a matter resting in the court's discretion; but the discretion thus vested in the court is a sound, not an arbitrary, discretion; and it may not be exercised in such way as to result in the denial of the right of review to which a party is entitled.
>
> * * * * * * * *

". . . Whether petitioners were entitled to naturalization or not, they were, at least, entitled to have their petitions passed upon so that they might appeal from an adverse decision to this court; and the continuance over their protest did not lie within the limits of judicial discretion as to granting continuances but amounted to a refusal to exercise power which petitioners had a right to have exercised. 35 Am. Jur., pp. 25, 26."

Finally, no restatement of the facts by respondents can whittle away the following undeniable truths:

1. The California action below was filed before the Nevada or Delaware actions.

2. The Nevada forum was selected by Respondents.

3. The California action was dismissed the first time at the instance of Respondents without the knowledge or consent of plaintiffs' California attorney of record.

4. The California Court refused to hear and determine any proceedings in the California action prior to the adjudication in Nevada and Delaware.

5. The Nevada Court refused to permit intervention by the Petitioners November.

6. The California Court failed to act on the Novembers' petition to intervene.

7. The Nevada Court tried the case and/or approved a compromise of it on a motion to dismiss grounded on mootness (allegedly resulting from the sale of all assets to Hughes). The stockholders had notice only of that motion and not of any trial or hearing to approve a compromise.

8. The California Court dismissed the second time without hearing the charges of fraud and collusion.

ARGUMENT.

I.

The Nevada State Judgment, Being Subject to Attack for Collusion, Is Not Res Judicata Until the Issue Is Tried in the Court Where It Is Legally and in Good Faith Raised.

The heading above was treated at page 17, *et seq.*, of the Petition. We would add the following citation:

> *Cuthill v. Ortman-Miller Mach. Co.*, 216 F. 2d 336, 338 (C. A. 7, 1954).

Had the Court below tried the issue and found against the allegations, then the cases cited by Respondents would have had some applicability.

In *Masterson v. Pergament*, 203 F. 2d 315, 330, there was no opposition to the settlement, no proposed interveners, and no contention that the stockholders were not adequately represented.

In *Cohen v. Young*, 127 F. 2d 721, 724-725, there was a finding below of adequate representation. Nevertheless, on an appeal by a proposed intervener who had been denied intervention below, the judgment was reversed over the opposition, as herein, of the plaintiffs.

In *Winkelman v. General Motors Corporation*, 48 Fed. Supp. 490, it was held that the trial court's role is to ferret out fraud and collusion. This is the role which the District Court should have assumed when the issue was raised before it.

In *Pergament v. Frazer,* 93 Fed. Supp. 13, 16, the action tried was the action first filed. All objecting stockholders who appeared in other courts appeared here. The Court tried the issues of collusion and inadequate representation.

In *Stella v. Kaiser,* 218 F. 2d 64, one of the out-of-state stockholders who had appeared in *Pergament v. Frazer, supra,* attempted to *retry* the issue of collusion in his own state.

In the instant case, the issues of collusion and inadequate representation were "tried" in Nevada as between the very parties charged with collusion and fraud. [R. 114, 245.] Respondents' argument here amounts to this: "We whose very actions are challenged, are not subject to attack in California because between ourselves we have resolved the issues in Nevada." Unlike in the *Stella* case, *supra,* no intervening stockholder here was permitted to *try* the issue of collusion in Nevada; and therefore again unlike *Stella,* no intervening stockholder, including the Novembers, has attempted to *retry* the issue of collusion in the Courts below.

Moreover, the Novembers were denied intervention in Nevada. They had the right to intervene here. (Please see Pet. p. 17 *et seq.;* also *Pellegrino v. Nesbit,* 203 F. 2d 463 (C. A. 9, 1953); *Cuthill v. Ortman-Miller Machine Company,* 216 F. 2d 336 (C. A. 7, 1954).)

In the *Cuthill* case, *supra,* the Court stated:

> "The facts pleaded were sufficient to justify appellant's fears; they brought him within the doctrine

enunciated by the Supreme Court in United States v. Throckmorton, 98 U. S. 61, at page 65, 25 L. Ed. 93 * * *. See also U. S. v. Kusche, D. C. 56 F. Supp. 201, at page 216. Here appellant pleaded with particularity and great detail facts tending to show that there had been *no adversary trial of the issue in the case; that this situation emanated from the collusion of the original parties;* that appellant's interests were adversely affected and *that no adequate representation of his and the corporate interests had been supplied. Inasmuch as Rule 60(b) endows the court with power to vacate any fraudulent judgment, plaintiff was entitled to be heard upon his averments.* Obviously the District Court has inherent power to investigate such averments of fraud. Hazel-Atlas Co. v. Hartford Empire Co., 322 U. S. 238, 64 S. Ct. 997, 88 L. Ed. 1250; Universal Oil Products Co. v. Root Refining Co., 328 U. S. 575, 66 S. Ct. 1176, 90 L. Ed. 1447." (Emphasis added.)

II.

No Stockholder (Except the Castlemans and Feuerman Personally) or Attorney (Except Their New York Attorneys) Is Estopped From Challenging the Nevada State Judgment for Collusion.

This incontrovertible rule is the key to much of the error of the reply briefs.

The Novembers were denied intervention in Nevada; their application below was not heard and determined. The Novembers were never permitted to litigate the issue of collusion in Nevada or California.

Please note that the Courts below did not rule that the Novembers were estopped to intervene in this case by reason of the denial in Nevada or because their application to intervene was untimely. Moreover, the action

below was a representative action. Assuming, as we must, the truth of the allegations of collusion in the Nevada action, the question, no matter how raised, must be considered by the forum where the action was commenced prior to the challenged action and where the proceeding is adversary.

Cf. Cuthill v. Ortman-Miller Machine Company, 216 F. 2d 336, 338, 339 (C. A. 7, 1954).

III.

The Nevada Judgment Did Not Meet the Requirements of Due Process.

Because the District Court refused to try the issue, the ultimate correctness of the above heading is really not before this Court. For example, Respondents' claim that the Novembers had notice of the Nevada "compromise" because they "appeared" by an attorney. This again flies in the face of the rule that the Novembers' allegations to the contrary must be assumed true. [R. 257-259.]

Moreover, without directly challenging the Petition, page 5, demonstrating that the Nevada court converted a motion to dismiss for mootness, of which the stockholders had notice, to a 23(c) hearing, of which the stockholders had no notice [R. 200, 202, 255, 256], Respondents cite from their own evidence (in conflict with Petitioners') to support their side of the issue. *But issue it is, and it has not yet been resolved.*

IV.

Neither the Delaware Action nor the Sale to Respondent Hughes of All Assets Rendered the Action Herein Moot.

Petitioners' citation in their Petition to support the above heading remains unchallenged by Respondents. Moreover, respondents cite no authority other than the Delaware case itself.

If quotation by respondents of our brief in the Court of Appeals is proper, we would prefer the full quotation as follows:

> "We concede that the Delaware action is *res judicata* on the issue as to whether the sale was fair and that the appellants here do not and cannot challenge that judgment.
>
> "However, this is no concession that the Delaware judgment renders moot the action herein. The question still remains one of law, to wit: may an officer and stockholder sued for fraud and mismanagement by other stockholders defeat jurisdiction by buying up all of the assets, purportedly including stockholder derivative causes of action.
>
> "The Delaware action cited in the District Court's memorandum, *Schiff v. RKO Pictures Corp.*, 104 A. 2d 267 (1954), never ruled on this question as it was not before it. Even if it had, it would have been *dicta* and not binding on a foreign court which must determine its own jurisdiction. Obviously, whether a first judgment is *res judicata* or otherwise binding on a second court is determinable not by the first court but by the second court.

> "Even the Nevada court did not hold that the Delaware court rendered the action in Nevada moot. Although the motion to dismiss before the Nevada court was grounded on mootness, it instead held a hearing (without notice on the issue) as to whether the Hughes' offer to buy was a fair and adequate compromise. The Nevada court decided this question for itself without reference to the Delaware judgment."

We submit that a stockholder action may not be disposed of on the basis of purchase by the person charged with the wrongdoing.

Conclusion.

The decisions below, if undisturbed, leave the posture of the litigation as follows: (a) no court in any adversary proceeding has even examined into, no less ruled on, the charges responsibly made under oath that the Nevada action was a fraud and a sham; (b) the Nevada court refused intervention to the petitioners November who could have supplied opposition [R. 244]; (c) without notice to the stockholders of anything but a motion to dismiss for mootness [R. 200, 202, 255], it approved the purported compromise [R. 215, 244]; (d) the Delaware court did not have before it that issue, only whether the sale to Hughes was fair; and (e) the California Court refused to hear or act.

The Court of Appeals, it is respectfully submitted, has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

"Hear the causes between your brethren." (Deut. 1:6.) This biblical admonition went unheeded below.

The Petition for a Writ should be granted.*

Dated: February, 1956.

Respectfully submitted,

JACK P. BLUME,
Attorney for Petitioners.

BERNARD REICH, and
MORRIS E. COHN,
Of Counsel.

---

*This Court has summarily vacated judgments and remanded either to the Court of Appeals *en banc* for further consideration in view of the conflict of views between different panels (on the abdication issue) (*Romero v. Weakley*, 226 F. 2d 399), (and the intervention issue) (*Pellegrino v. Nesbit*, 203 F. 2d 463). Please see *United States ex rel. Robinson v. Johnston*, 316 U. S. 649 (1942); *Civil Aeronautics Board v. American Air Transport*, 344 U. S. 4, 5 (1952); *Western Pacific Railroad Case*, 345 U. S. 247, 260, n. 20 (1953); or to the trial court for trial of all issues on the merits (*Securities and Exchange Commission v. Otis & Co.*, 338 U. S. 843 (1949); *Ewing v. Gardiner*, 341 U. S. 321 (1951)).

APPENDIX.

Excerpts From Record 371-3.

"Mr. Reich: I will stipulate that my fees may be small. I will stipulate you don't have to fix fees at all.

The Court: You don't have to so stipulate.

Mr. Reich: Your Honor, it is important that my position be stated.

The Court: I think I understand your position. And I think if they want to fire you out of the case they should pay you for what services you have rendered. * * *. But I would dislike very much to be holding onto a case when the client wants to fire me.

Mr. Reich: Assume that you are practicing law instead of occupying the bench and assume—

The Court: If I had been practicing law this case wouldn't have been here.

Mr. Reich: Well, your Honor, if you had information that I have—assuming that you had certain information which led you to believe that the stockholders weren't being properly represented wouldn't you feel it was your duty to the court to apprise the court * * *.

* * * This action was dismissed, your Honor, without my knowledge. Certainly you would have felt the duty as a lawyer as I did to set the record straight * * *

The Court: I think you lawyers should get together in an arena of your own and fight it out and settle this case between the lawyers as to who is who in the case without intervention on my part. * * *

Mr. Reich: Well, your Honor, what would you do about it? What could I do about it? You advise me and I will do it. I just want to do what is right. You tell me what to do and I will do it.

The Court: I am not telling you what to do."